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No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

SCOTT A. WALKER

Petitioner

vs.

ROGER ENDELL, DIRECTOR OF ALASKA DEPARTMENT OF CORRECTIONS

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) CAN THE STATE OF ALASKA SHIFT THE BURDEN TO A DEFENDANT TO PROVE DURESS BY A PREPONDERANCE EVEN THOUGH DOING SO REQUIRES NEGATING CRIMINAL INTENT AND EVEN THOUGH THE JURY INSTRUCTIONS FAILED TO CLARIFY THE STATE STILL HAD THE BURDEN TO PROVE CRIMINAL INTENT? SHOULD MARTIN v. OHIO, 107 S.Ct. 1098 (1987) BE EXTENDED TO DURESS?

(2) DID JURY INSTRUCTIONS WHICH TOLD THE JURY TO VIEW THE DEFENDANT'S TESTIMONY WITH "DISTRUST" AND WHICH PERMITTED REJECTING DURESS BASED ON CIVIL RECKLESSNESS CONSTITUTE PLAIN ERROR?

(3) DID THE TRIAL COURT VIOLATE DOUBLE JEOPARDY AND DUE PROCESS BY IMPOSING CONSECUTIVE SENTENCES AND RELYING ON FACTS INCONSISTENT WITH THE JURY'S ACQUITTAL?

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CONSTITUTIONAL PROVISIONS RELIED UPON

The Fifth Amendment to the United States Constitution states:

> ...No person..., shall be deprived of life, liberty or property without due process of law....

The Sixth Amendment to the United States Constitution states:

> ...In all criminal prosecutions the accused shall enjoy the right to an... impartial jury....

Alaska Statute 11.41.300(a) provides:

> A person commits the crime of kidnapping if
>
> (1) the person restrains another with intent to
>
> (A) hold the restrained person for ransom, reward, or other payment;
>
> ...

Alaska Statute 11.81.440 provides:

> Duress. (a) In any prosecution for an offense, it is an affirmative defense that the defendant engaged in the proscribed conduct because the defendant was coerced to do so by the use of unlawful force upon the defendant or a third person, which force a reasonable person would have been unable to resist.
>
> (b) The defense of duress is not available when a person recklessly

places oneself in a situation in which it is probable that one will be subject to duress.

Alaska Statute 11.81.900 provides in pertinent part:

> Definitions. (a) For purposes of this title, unless the context requires otherwise,
>
> (1) a person acts "intentionally" with respect to a result described by a provision of law defining an offense when the person's conscious objective is to cause that result; when intentionally causing a particular result is an element of an offense, that intent need not be the person's only objective;
>
> ...
>
> (3) A person acts "recklessly" with respect to a result or to a circumstance described by a provision of law defining an offense when the person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that disregard of it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation; a person who is unaware of a risk of which the person would have been aware had that person not been intoxicated acts recklessly with respect to that risk;
>
> ...

(b) In this title, unless otherwise specified or unless the context requires otherwise,

(1) "affirmative defense" means that

(A) some evidence must be admitted which places in issue the defense; and

(B) the defendant has the burden of establishing the defense by a preponderance of the evidence;

I. INTRODUCTION

Petitioner requests review of the Ninth Circuit in Walker v. Endell, ____ F.2d ____ (9th Cir. Op. 86-4230, 06/27/88).

II. OPINION BELOW

Walker v. Endell, supra, as modified appears in Appendix I.

III. JURISDICTION

The Ninth Circuit (06/27/88) upheld the District Court denial of a Petition for Habeas Corpus under 28 USC 2254. This followed the decision in the Alaska State Courts of Walker v. State, 674 P.2d 825 (Alaska App. 1983). All state remedies were exhausted. This petition was filed within 90 days. Jurisdiction is pursuant to 28 USC 1254(1).

IV. STATEMENT OF THE CASE

A. FACTS AT TRIAL

SCOTT WALKER was charged with codefendants Willhite and Hopkins in Anchorage, Alaska, with murder, kidnapping, robbery,

theft and burglary.[1] SCOTT WALKER admitted burglary and theft, but denied shooting either victim and claimed his participation in the kidnap and robbery was only as a result of duress.

Codefendant Willhite, in exchange for immunity, testified for the state. According to Willhite, in May of 1981, SCOTT WALKER, Hopkins and Willhite planned to burglarize the home of Mildred Walatka and her son, Herbert Oakley, to steal coins [Tr 561].[2] SCOTT WALKER was 19 years old and the youngest. Hopkins was the oldest and gave all orders [Tr 140, 592]. Hopkins convinced the group there was a contract on their lives and that they had to be armed [Tr 78, 546]. Hopkins and Willhite carried

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[1] SCOTT WALKER's robbery conviction was pursuant to AS 11.41.510. His conviction for kidnapping was pursuant to AS 11.41.300(a).

[2] "Tr" refers to trial transcripts and "ER" refers to excerpts of the record to the Ninth Circuit.

.9 mm pistols. SCOTT WALKER was given a .22 mm pistol [Tr 551-555].

The group thought the Walatka house was empty. No cars or lights were visible [Tr 157, 563]. SCOTT WALKER knocked to make sure nobody was home. To their surprise, Mr. Oakley answered the door [Tr 564]. If someone was home, the group had planned to feign car problems, use the phone, and leave [TR 564].

While SCOTT WALKER was using the phone, and contrary to the plan, Willhite pulled his weapon. Willhite testified he did so because Hopkins, the ringleader, ordered him to do so [Tr 91-100]. Willhite followed Hopkins' orders since he was afraid Hopkins would kill him. Willhite knew that Hopkins had murdered another associate who had

"chickened out" in an unrelated burglary [Tr 557, 161].[3]

Hopkins and Willhite, with weapons drawn, determined there was no coin collection [Tr 105-106]. Hopkins ordered the group to take Mrs. Walatka to the bank, assuring nobody would be hurt, if everyone cooperated [Tr 108, 162]. SCOTT WALKER was told by Hopkins to drive the car while Willhite or Hopkins sat in the back with drawn weapons [Tr 569]. Hopkins took Mrs. Walatka into the bank and returned with $600.00. Hopkins then ordered the group at gunpoint to drive out of town, claiming he would let the victims out unharmed when they were far enough way to ensure a getaway, if they all cooperated [Tr 162].

SCOTT WALKER drove a distance and pulled off in a public area to let out Mrs.

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[3] In fact, the killing which Willhite knew of resulted in a conviction of Hopkins for murder in a separate and unrelated trial.

Walatka and Mr. Oakley, unharmed [Tr 571, 110]. It was undisputed that Hopkins vetoed this idea and at gunpoint ordered SCOTT WALKER to drive to a remote location [Tr 572].

SCOTT WALKER drove to a remote area. Hopkins ordered everyone out of the car. Mrs. Walatka and Mr. Oakley were shot and killed. Ballistics established that the shots were fired only from the .9 mm pistols [Tr 128, 102]. No shots were fired from SCOTT WALKER's .22.

SCOTT WALKER testified that from the time Willhite and Hopkins pulled weapons, he cooperated only out of fear for his life and the victims. SCOTT WALKER had also heard Hopkins had killed an accomplice who chickened out in an unrelated burglary. SCOTT WALKER thought of bolting but was always covered by Willhite or Hopkins' weapon [Tr 562-574]. SCOTT WALKER denied using his pistol or shooting either victim and the physical evidence, including ballistics

established that no shots were fired from SCOTT WALKER's .22 pistol.[4]

B. THE TRIAL COURT'S INSTRUCTIONS TO THE JURY AND IMPOSITION OF SENTENCE

Pursuant to AS 11.81.440(a), the trial court placed the burden for duress on SCOTT WALKER by a preponderance. [Instr 23(b), ER 71.] SCOTT WALKER objected to the burden shift in a timely manner. The burden shift on duress was confusing since it contradicted the instruction which defined "intent". Nowhere did the jury instructions specify that once the burden shifted on duress that the state still had the burden to prove criminal intent.

Additionally, the trial court gave two instructions which were raised as "plain

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[4] Both SCOTT WALKER and Willhite testified that Hopkins changed the original plan and ordered them to cooperate at gunpoint. The only dispute at trial was that Willhite claimed SCOTT WALKER and Hopkins did the shooting. However, substantial evidence, including the ballistics, was to the contrary. The jury, in acquitting SCOTT WALKER of the murder, agreed that he did not shoot either victim.

error" in the state appeal. First, the court instructed the jury that they should view an accomplice's testimony with "distrust". [Instr 24, Er 72.] Since SCOTT WALKER was an "accomplice", the instruction told the jury to view SCOTT WALKER's testimony with distrust. Secondly, the trial court instructed that duress was not available if someone was "reckless" in placing himself in a dangerous position, but since the instruction failed to define reckless, it permitted rejection of duress based on civil recklessness [ER 71].

Finally, double jeopardy violations were raised based on imposition of consecutive sentences totalling 89 years and because the sentencing court relied on facts inconsistent with the acquittal for murder.

V. REASONS FOR GRANTING THE WRIT

A. THE BURDEN SHIFT ON DURESS VIOLATED DUE PROCESS SINCE IT FORCED THE DEFENDANT TO NEGATE CRIMINAL INTENT

This case raises the question of whether a state may shift the burden to the

defense to prove duress by 51% even though doing so forced SCOTT WALKER to negate criminal intent. Shifting the burden of duress relieved the state of its burden of proving any criminal intent in violation of due process and the Fifth Amendment. Martin v. Ohio, supra, Morrisette v. U.S., 342 U.S. 246, 72 S.Ct. 240 (1952); Mullaney v. Wilbur, 421 U.S. 684 (1975); Patterson v. New York, 53 L.Ed.2d 281, 432 U.S. 197 (1977); Leland v. Oregon, 343 U.S. 790 (1952); In re Winship, 397 U.S. 358 (1970).

In 1988, this court in Martin v. Ohio, supra (Justices Powell, Brennan, Marshall, and Blackmun dissenting), permitted shifting the burden for self-defense. The Ninth Circuit erred in extending Martin v. Ohio, supra, to duress.

Martin v. Ohio, supra, should not apply to this case since: (1) duress (unlike self-defense) directly negates the state's burden to show criminal intent; (2) the facts of SCOTT WALKER's duress directly

overlap with the state's burden on criminal intent; (3) Alaska's statutes (unlike Martin, supra) do not require "prior calculation and design" which separates criminal intent from duress and; (4) the jury instructions in SCOTT WALKER's case (unlike Martin, supra) are confusing and do not tell the jury how to resolve the contradictory burdens.

A hypothetical illustrates why duress, unlike self-defense, negates criminal intent. Assume a bank teller at gunpoint hands money to a bank robber. The teller is not guilty of embezzlement even though she "intentionally" hands the money to the robber since she lacks criminal intent. The teller acts only because a robber tells her at gunpoint what to do, even though she never formulated the idea. Can the state force the teller to prove her innocence by 51%?

Can the teller be convicted even if the jury believes by 50% that she acted only out

of fear? Such a result is contrary to Anglo-American jurisprudence since duress, by definition negates criminal intent. When the teller claims she acts out of duress, her defense is analytically identical to the claim that she never formulated criminal intent. Similarly, SCOTT WALKER'S claim of duress is the opposite side of the coin of criminal intent. If he acted only to save lives, then he did not act with a criminal intent.

This Court established guidelines in Mullaney v. Wilbur, supra, and Patterson v. New York, supra. In Mullaney, supra, shifting the burden on "heat of passion" violated due process, since heat of passion overlapped with "malice". Id. at 687. In a concurrence, Chief Justice Rhenquist distinguished Leland v. Oregon, supra, which permitted the burden shift on insanity noting:

> ...insanity bears no necessary relationship to the existence of the required

mental elements of the crime. Id. at 704-706.

In Patterson v. New York, supra, this Court upheld a burden shift for "extreme emotional disturbance," only because New York still had to independently prove criminal intent:

> [Emotional disturbance] ... does not serve to negate any facts of the crime which the state is to prove in order to convict as murder. It constitutes a separate issue on which the burden is required to carry the burden of persuasion... . Id. at 206-207.

While state legislatures have wide powers to define elements of a crime, due process imposes limits beyond which the state may not go in shifting the burden. As this court stated in Patterson, supra:

> But there are obviously constitutional limits beyond which the state may go in this regard. This view may seem to permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crime now defined in our statute. There are obviously constitutional limits beyond which the state may not go. It is not within the province of the legislature to declare an individual guilty or presumptively guilty of a crime. Patterson v. New York, 53 L.Ed.2d at 292-293. (Emphasis added.)

Criminal intent is exactly one area where the state may never legislate away the burden of proof.[5]

Martin v. Ohio, supra, does not overrule these principles. In Martin, supra, the burden shift for self-defense was unrelated to Ohio's burden to show a separate criminal intent. In Martin, supra, the defendant, after an argument, walked upstairs, obtained a gun, and some time later shot her husband three times when her husband came toward her. Under Ohio law, the state had to prove Martin killed her husband "...purposely and with prior calculation and design...." Id. at 1100. This Court held:

> It did not seek to shift to Martin the burden of proving any of those elements and the jury's verdict reflects that none of her self-defense evidence raised a reasonable doubt about the state's

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[5] Morrisette v. U.S., supra; In re Winship, supra; Connecticut v. Johnson, 460 U.S. 73 (1983); Francis v. Franklin, 105 S.Ct. 1965 (1985); Rose v. Clark, 92 L.Ed.2d 640 (1986).

> proof that she purposefully killed with prior calculation and design. Id. at 1102.

This Court held there was no factual overlap between self-defense in Martin's case and criminal intent:

> We are thus not moved by assertions that the elements of aggravated murder and self-defense overlap in the sense that evidence to prove the latter will often tend to negate the former. Id. at 1102.

Unlike Martin, supra, or self-defense, it is impossible to separate SCOTT WALKER's claim of duress from criminal intent. Unlike Ohio's statute, Alaska's statutes on robbery and kidnapping require only a general finding of criminal intent. There is no requirement of "purpose, prior calculation, or design."/6

/6 SCOTT WALKER's jury was instructed "...When a person intentionally does that which the law declares to be a crime he is acting with a culpable mental state, even though he may not know that his act or conduct is unlawful.... A person acts 'intentionally' with respect to a result when his conscious objective is to cause that result." [ER 162.]

In Martin v. Ohio, supra, there was temporal and geographical separation between self-defense and the criminal mental state of "prior design." By contrast, SCOTT WALKER acted out of duress throughout the kidnap and robbery. Duress was inseparable from SCOTT WALKER's intent.

In this regard, duress differs from self-defense. In self-defense, the defendant independently formulates the intent to act. For example, in Martin, supra, it was the defendant's idea to shoot her husband. However, SCOTT WALKER (or the bank teller in the hypothetical) never formulated the idea, and only followed the directions of someone else at gunpoint.

Among the few jurisdictions which have attempted a burden shift on duress, cases are split. Several cases hold that a burden

shift on duress violates federal due process.[7] A few cases hold to the contrary.[8]

In Carlton, supra, the Minnesota Supreme Court held the burden shift on duress incompatible with Mullaney, supra, stating:

> ...the element of intent requires a conscious desire and purpose to bring about a criminal result and the finding of duress negates that conscious purpose. The defendant cannot be made to bear the same burden of proof on the defense of duress because a criminal result compelled through force negates the purposeful intent that the state is required to show.... 338 N.W.2d 30-31.

The Seventh Circuit in U.S. v. Cullen, 454 F.2d 386 (7th Cir. 1971) agrees, stating:

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[7] State v. Carlton, 338 N.W.Ed. 26 (Minn. 1983); People v. Field, 284 S.W. 581 (Mich. 1971); Stafford v. State, 284 S.W. 581 (Tex. 1926); People v. Condley, 138 Cal.Rptr. 515, 521; see also Comments: The Constitutionality of Criminal Affirmative Defenses: Duress and Coercion, 11 USF L.Rev. 123 (1976).

[8] Foraker v. State, 394 A.2d 208 (Del. 1978); People v. Bastidas, 494 N.E.2d 446 (N.Y. 1986); Rodriquez v. Scully, 788 F.2d 62 (2d Cir. 1986); Takacs v. Engle, 768 F.2d 122 (6th Cir. 1985).

...every crime must be the product of the defendant's free will; and must reflect his choice to perform a criminal act. If the act itself was...caused by physical duress or compulsion, even the narrowest intent would be absent and the defendant would be innocent of the crime; indeed it could be said that he did not act at all. Id. at 390.

See also Commonwealth v. Robinson, 415 N.E.2d 805 (Mass. 1981) (Massachusetts Supreme Judicial Court writes that "... duress may be seen as removing the very basis of criminal liability...." Id. at 814).

The Circuits have defined duress in a manner inconsistent with the burden shift, and the government must disprove duress beyond a reasonable doubt.[/9] Most jurisdictions place the burden for duress on the

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[/9] U.S. v. Hearst, 563 F.2d 1331 (9th Cir. 1977) (once defendant shows some evidence, burden shifts to government); U.S. v. Johnson, 516 F.2d 209, 212 (8th Cir. 1975); U.S. v. Cullen, 454 F.2d 386 (7th Cir. 1971); U.S. v. Mitchell, 725 F.2d 832 (2d Cir. 1983).

state./10 Numerous well written decisions require the state to bear thedburden./11 Commentators agree that duress is the negation of criminal intent./12 Burden shifts for duress were strictly forbidden at common law and to this day are prohibited in England./13

/10 A recent notation at 43 ALR 3d 221 notes that the majority of states prohibit the burden shift for self-defense on statutory or constitutional grounds. States which prohibit the burden shift are: Alabama, Arkansas, Hawaii, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Michigan, Missouri, West Virginia, Arizona, California, Georgia, Florida, Iowa, Minnesota, Mississippi, Nevada, North Carolina, Ohio, Pennsylvania, Rhode Island, Texas, Utah and Washington.

/11 State v. Carlton, supra; People v. Field, supra; Stafford v. State, 284 S.W. 581 (Tex. 1926); Commonwealth v. Robinson, supra; State v. Evans, 362 A.2d 629 (Md. 1976) (dicta); People v. Eldridge, 383 N.E.2d 19 (Ill. 1978); Esquibel v. State, 576 P.2d 1129, 1132 (N.M. 1978); Moes v. State, 284 N.W.2d 66, 71 (Wisc. 1979).

/12 See Model Penal Code (Sec. 2.09 at 89, Tentative Draft No. 10, 1960); American Law Institute Proposal; Devitt and Blackmar; Lafave and Scott Handbook Criminal Law at 374 (1972); Comments, 11 USF L.Rev. 130 (1976).

/13 Rex v. Legg Kelling, 27 (1974); Wilmington v.
(Footnote Continued)

Significantly, Martin v. Ohio, supra looked to the jury instructions to determine if the jury might have been confused by the different burdens. In Martin, supra, this Court assured that the instructions separated "prior calculation" from self-defense.

The problem of jury confusion is much greater for duress since duress by definition overlaps with intent. In U.S. v. Mitchell, 725 F.2d 832 (2d Cir. 1983), the Second Circuit noted the confusion of burden shift on duress:

> Apart from constitutional concerns ... there is the grave possibility of jury confusion if a jury is instructed on the one hand that the prosecution must prove all elements of the crime including willfulness beyond a reasonable doubt and on the other hand that the

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(Footnote Continued)
Director of Public Prosecutions, A. 462 (House of Lords and Privy Council); Rex v. Bone 2 All, E.R. 644 (CCA 1968); Regina v. Gill, 1963 1 WLR 841, 846 (Crim. App.). Other countries such as the Soviet Union place the burden on the defense to establish benign intent, once an accusation is made. The presumption of innocence is described in the Soviet Union as the "worm eaten dogma of a bourgeois doctrine." See Comments, 11 USF L.Rev. 130 at n. 27.

> prosecution need only disprove duress by a preponderance. Such instructions can create unacceptable risk that the jury will accept a preponderance of the evidence as sufficient to satisfy the government's burden of proving willfulness beyond a reasonable doubt. Id. at 836.

Unlike Martin v. Ohio, supra, the instructions did not require any specialized mental state such as "design" or "prior calculation", to separate intent from duress. SCOTT WALKER's jury was instructed that the state need only prove a general intent. The instructions, however, shortly thereafter stated that SCOTT WALKER must prove duress (benign intent) by a preponderance. The jury was never instructed that they must independently resolve these two instructions.

It is impossible to guess how the jury resolved these contradictory burdens. In Rose v. Clark, 92 L.Ed.2d 640 (1986); Francis v. Franklin, 105 S.Ct. 1965 (1985) and Connecticut v. Johnson, 460 U.S. 73 (1983), this court held it would not

speculate as to how a jury resolves contradictory jury instructions on criminal intent, and that presumptions of intent must result in reversal.

If the state is ever allowed to shift the burden on duress it should at least be required to clearly explain the contradictory burdens to the jury. This court should grant review to resolve the scope of Martin, supra, and to ensure the historic safeguard of proof beyond a reasonable doubt is not eliminated. As stated in In Re Winship, supra:

> Proof beyond a reasonable doubt has a vital role in our criminal procedure for cogent reasons.... Use of a reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt as to whether innocent men are being condemned. Id. at 363-364.

B. THE JURY INSTRUCTIONS CREATED PLAIN ERROR AND AGGRAVATED THE BURDEN SHIFT ON DURESS

Two jury instructions merit review under the "plain error doctrine" since they ... "so infected the entire trial that the resulting conviction violates due process."/14

The jury was told to view SCOTT WALKER's testimony (as an "accomplice") with distrust. SCOTT WALKER's claim of duress rested on his testimony. Nothing was more important than SCOTT WALKER's right to testify on his own behalf. Yet, the instruction created a presumption that SCOTT WALKER's testimony was not credible. This error went to the heart of the trial and violated due process./15

/14 Cupp v. Naughten, 414 U.S. 141, 147 (1973); Henderson v. Kibbs, 431 U.S. 145, 154; County Court of Ulster County v. Allen, 442 U.S. 140, 154 (1979).

/15 Kool v. U.S., 409 U.S. 100 (1972) (violation of due process where instructions tell jury a defense witness testimony is "open to suspicion"); Francis

(Footnote Continued)

The second instruction told the jury that they should reject duress if SCOTT WALKER was "reckless", but nowhere required a finding of "criminal recklessness." Thus, the jury was permitted to reject the defense based purely on their own definition of civil recklessness. This, again, was plain error since it "infected the entire trial process." Id.

Not only were these instructions "plain error," but they added confusion to the burden shift on duress. First, the burden was shifted on duress. Second, the instructions failed to clarify the state still had any burden on criminal intent. To add injury, the jury was then told to view SCOTT WALKER with distrust and to reject duress if he was civilly careless. These instructions made it impossible to meet the burden.

(Footnote Continued)
v. Franklin, supra; Rose v. Clark, 92 L.Ed.2d 640 (1986).

C. THE SENTENCE VIOLATED DOUBLE JEOPARDY AND DUE PROCESS

The trial court violated double jeopardy and due process by relying on findings inconsistent with the verdict. While the court stated it would accept the verdict, the court stated:

> ...you must have been aware that these people were going on their last ride after the money was taken from the bank and I agree with the state the state's position has always been that Mr. Willhite was guilty of Murder I and that Mr. Hopkins was guilty of Murder I and that you were guilty of Murder I .... [Tr 859.]

The sentencing court indicated he believed SCOTT WALKER knew that Hopkins would kill the victims, stating:

> ...And even though you are only 19 at the time the notion that you didn't realize immediately that these people were going to be executed is pretty difficult for this court to understand. [Tr 859.]

When SCOTT WALKER indicated he did not "intend anybody be killed," the sentencing court responded "...alright. I have a little different version than your perception of these proceedings on that date." [Tr 162.]

These comments indicate the sentencing court rejected the acquittal and sentenced SCOTT WALKER for murder. By ignoring the acquittal, the trial court violated double jeopardy./16

The trial court also violated double jeopardy by imposing 89 years of consecutive sentences. SCOTT WALKER was given two consecutive 40 year sentences, one for each victim and then given six consecutive years for robbery. Yet, in all of the above, SCOTT WALKER only acted singularly by driving the car. He took no separate actions against any individual. His conduct, which served as a basis for his kidnap was identical to his conduct which served as the basis for robbery.

/16 Albernaz v. U.S., 450 U.S. 333 (1981); Blockburger v. U.S., 284 U.S. 299 (1932); Missouri v. Hunter, 459 U.S. 359 (1983); Brothers v. Dowdle, 817 F.2d 1388 (9th Cir. 1987).

In Missouri v. Hunter, supra, this court permitted multiple sentences for robbery and use of a firearm during robbery only because a state indicated its intent to impose multiple sentences on the face of the statute. Id. at 366. The Alaska Statutes nowhere indicate the intent to impose consecutive sentences every time a robbery and a kidnapping both result from the same acts. Nowhere does Alaska's statute indicate its intent to impose multiple punishment for each victim where a defendant's actions are singular. The Ninth Circuit's ruling is thus inconsistent with Missouri v. Hunter, supra.

VI. CONCLUSION

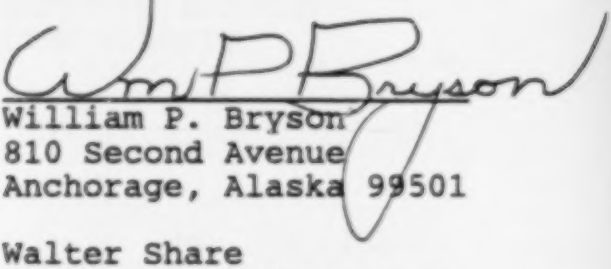
The burden shift on duress violated due process by forcing SCOTT WALKER to negate criminal intent. Martin v. Ohio, supra, should not be extended to duress since: (1) duress (unlike self-defense) directly negates the state's burden of criminal intent; (2) SCOTT WALKER's duress factually

overlaps with criminal intent; (3) Alaska's statutes do not require "prior calculation and design" which separates intent from duress; and (4) the instructions (unlike Martin, supra) did not tell the jury how to resolve the contradictory burdens.

This Court should review the burden shift issue to resolve the scope of Martin v. Ohio, supra, and to ensure that the historic burden of proof beyond a reasonable doubt remains the basis for all criminal convictions.

Finally, the Court's instructions to view SCOTT WALKER's testimony with distrust and reject duress based on civil recklessness were plain error and made the burden shift on duress impossible to prove. Consecutive sentences and reliance on facts inconsistent with the acquittal violated due process and double jeopardy and further merit review of this case.

Respectfully submitted this 29th day of August, 1988.



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For Publication

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Scott A. Walker,	
Petitioner-Appellant,	No. 86-4230
v.	D.C. No. CV-84-275-JMF
Roger Endell, Director, of the Alaska Department Corrections,	AMENDED OPINION
Respondent-Appellee,	

Appeal from the United States District Court
for the District of Alaska
James M. Fitzgerald, Chief District Judge,
Presiding

Argued and Submitted
May 4, 1987 -- Seattle, Washington

Filed September 23, 1987
Amended June 27, 1988

Before: Betty B. Fletcher, Robert Boochever
and William A. Norris, Circuit Judges.

Opinion by Judge Fletcher

SUMMARY

Criminal Law/Evidence/Criminal Sentencing

Appeal from kidnapping and robbery convictions and a 89 year prison sentence. The court affirmed holding that due process does not require the prosecution to prove absence of duress.

Appellant Scott Walker, along with two others, shot their victims to death in the course of a robbery. At trial, Walker claimed that his actions were motivated by fear for his own safety. He denied shooting either victim. The jury found him not guilty of murder but convicted him of robbery and kidnapping. He was sentenced to 89 years. It was affirmed on appeal. After the Alaska Supreme Court denied discretionary review, Walker filed this petition for habeas corpus, challenging the kidnapping and robbery convictions.

[1] Walker contends that by requiring him to prove duress by a preponderance of the evidence, the trial court and the Alaska statute impermissibly shifted the burden of

proof on intent, in violation of due process. [2] He also argues that an element of the crimes of robbery and kidnapping is "criminal intent" and that duress is merely the flip side of this element. [3] Alaska does not consider duress to be the negation of specific intent. [4] It has been rejected that states may only proscribe conduct performed with criminal intent. Due process does not require the prosecution to prove absence of duress. [5] Failure to comply with a state's contemporaneous objection rule bars habeas review unless the petitioner can show cause for the failure and actual prejudice. If, however, a state appellate court overlooks the procedural default and considers the objection on the merits, the cause and prejudice requirement does not apply. [6] The Supreme Court, in dicta, has noted that plain error review by a state appellate court negates a defendant's procedural default. [7] The court's

instruction on accomplice testimony was followed immediately by an instruction that accomplice testimony must be corroborated. [8] The failure to define criminal recklessness did not cause Walker to be in custody in violation of the constitution. [9] Although the omission may have been erroneous, Walker is not entitled to federal habeas relief unless the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process. [10] Under the Blockburger test, robbery and kidnapping constitute separate offenses because both require proof of an element not required by the other offense. Under Alaska law, one act of assault aimed at two victims constitutes two separate crimes and may be punished separately. [11] A sentencing judge may rely on facts relating to a prior acquittal in imposing an appropriate sentence. The trial judge knew that Walker was acquitted of the murder

charge. It was proper for the judge to consider the facts that the victims were killed and that during the crime Walker must have been aware that it was unlikely the victims were going to be permitted to live.

COUNSEL

William P. Bryson, and Walter Share, Anchorage, Alaska, for the petitioner-appellant.

David Mannheimer, Assistant Attorney General, Anchorage, Alaska, and Ronald W. Lorensen, Acting Attorney General, Juneau, Alaska, for the respondent-appellee.

OPINION

FLETCHER, Circuit Judge:

Scott Walker filed this habeas petition claiming that the following errors violated his right to due process; requiring him to prove duress by a preponderance of the evidence; failing to instruct the jury on

the meaning of recklessness, proof of which negates the duress defense; and instructing the jury to view "accomplice testimony" with distrust. He also claimed that punishing him cumulatively for robbery and two kidnappings, which arose out of the same transaction, violated the double jeopardy clause; and that sentencing him to a lengthy prison term was the equivalent of sentencing him for murder, a charge of which he was acquitted, in violation of his fifth and sixth amendment rights. The district court, adopting the recommendation of the magistrate, denied the petition. We affirm.

FACTS

On May 13, 1981, Walker, along with Dale Willhite and Timothy Hopkins, entered the Anchorage home of Mildred Walatka and her son, Herbert Oakley. According to Walker, the group's intent was to steal a coin collection, which Walker knew to be in the residence. Each of the three

codefendants was armed. Walker stated that he was surprised when Oakley answered the door, so as prearranged he feigned car problems, planning to leave without further incident. Walker testified that Hopkins then changed the plan and they remained in the house. It was uncontroverted that while the burglars were in the house, Willhite drew his gun, and ivory and jewelry were taken.

At gunpoint, Walatka and Oakley were then forced into their own car. With Walker driving, the five went to Walatka's bank, where she was forced to remove $600 from her account. Again with Walker at the wheel, the burglars took Walatka and Oakley away from the city, where both were shot to death. Walker assisted in hiding the bodies after the homicides.

At trial, Walker claimed that all of his actions after the feigned telephone call in the Walatka residence were motivated by a

fear for his own safety and that of the two victims. He testified that he knew Hopkins had killed an accomplice when he "chickened out" in a prior burglary. Walker further testified that they were armed only because Hopkins had said a contract had been taken out on their lives. He denied shooting either Oakley or Walatka, and testified that he intended for them to remain unharmed. Willhite, who was granted immunity in return for testimony against Walker, also testified that Hopkins changed the plan by drawing his gun, and that Willhite feared Hopkins.

Walker was tried on charges of theft, burglary, robbery, two counts of kidnapping, and two counts of murder. At trial, he admitted the theft and burglary charges, and was convicted on both. The jury apparently accepted some, but not all of his controverted testimony, because he was found not guilty on either count of murder, but was

convicted of robbery and both counts of kidnapping.

Judge Buckalew sentenced Walker to a cumulative term of 89 years in prison. The Alaska Court of Appeals affirmed in a published opinion, Walker v. State, 674 P.2d 825 (Alaska Ct. App. 1983). After the Alaska Supreme Court chose not to exercise its discretionary review, Walker filed this petition for habeas corpus, challenging the kidnapping and robbery convictions.

DISCUSSION

I. Duress

[1] Walker contends that by requiring him to prove duress by a preponderance of the evidence, the trial court and the Alaska statute, A.S. 11.81.440(a), impermissibly shifted the burden of proof on intent, in violation of due process. Due process requires that the prosecution prove every element of a crime beyond a reasonable doubt. Patterson v. New York, 432 U.S. 197

(1977); Mullaney v. Wilbur, 421 U.S. 684 (1975). If a defense negates an element of the crime, rather than mitigates culpability once guilt is proven, it is unconstitutional to put the burden of proof on the defendant. Takacs v. Engle, 768 F.2d 122, 125 (6th Cir. 1985). The issue then, is whether proof of duress necessarily entails disproof of the intent elements of the crimes of robbery and kidnapping under Alaska state law.

[2] Walker argues that an element of the crimes of robbery and kidnapping is "criminal intent", and that duress is merely the flip side of this element. His argument takes two courses; he argues, first, that under Alaska law, criminal intent is an element of the crimes, and second, that, even if criminal intent is not acknowledged as an element by the Alaska law, due process requires that criminal intent be established by the government. We reject both arguments.

Under Alaska law, a person commits robbery if he uses or threatens to use immediate force with the intent to prevent or overcome resistance to the taking of property or with the intent to compel a person to deliver property. A.S. 11.41.510. A person commits kidnapping if he restrains another with the intent to hold the person for ransom, use the person as a shield, inflict personal injury upon the person, interfere with the performance of a governmental function, or facilitate the commission of a felony. A.S. 11.41.300(a) (1). An alternative provision for the crime of kidnapping defines the crime without reference to a specific intent element. A.S. 11.41.300(a)(2). Alaska, however, does not require the state to prove a "criminal intent."

[3] Opinion differs as to whether duress generally prevents the mens rea required for criminal culpability. United

States v. Mitchell, 725 F.2d 832, 835 (2d Cir. 1983). The Court of Appeals of Alaska held in Walker's appeal that under Alaska law, duress does not preclude an intent to commit the crime, but rather is only a justification for conduct that otherwise would be criminal. Walker, 674 P.2d at 828-29. Under this statutory scheme, we conclude that placing the burden to prove duress on Walker was constitutional. By referring to the term, "criminal intent," Walker confuses the notions of objective and motive. The statutes prohibit particular action undertaken with a particular objective. For example, kidnapping is established if a defendant restrains another with the conscious objective of inflicting physical injury. But the reason that the defendant has this objective involves the separate issue of motive. Thus, a defendant can restrain another with the intent to inflict injury, in the sense that he knows

that his actions will lead to injury or that his purpose is to cause injury, but act in this manner in order to comply with the demands of another. Because Alaska does not consider duress to be the negation of specific intent, duress may, consistent with due process, be treated as an affirmative defense.

[4] Walker further argues that due process requires that Alaska adopt the view that criminal intent is an element of every crime, and that even if Alaska deems duress to be consistent with specific intent, it is necessarily inconsistent with criminal intent. The Supreme Court, in Martin v. Ohio, 107 S.Ct. 1098 (1987), in considering the constitutionality of imposing a burden on defendants to prove self-defense, rejected the argument that states may only proscribe conducted performed with criminal intent. Id. at 1103. Other circuits that have considered whether due process

prohibits placing the burden on the defendant to prove duress have held that because society's notions of criminal law, as implemented by the "'doctrines of actus reus, mens rea, insanity, mistake, justification, and duress,'" are constantly changing, constitutionalizing any formula, and thereby divesting the states of authority, would be inappropriate. Mitchell, 725 F.2d at 835 (quoting Powell v. Texas, 392 U.S. 514, 536 (1968); see also Davis v. McCotter, 766 F.2d 203, 204 (5th Cir. 1985).[1] We therefore find that due process does not require the prosecution to prove absence of duress.

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[1] Walker relies on a line of Ninth Circuit cases beginning with United States v. Hearst, 563 F.2d 1331 (9th Cir. 1977), cert. denied, 435 U.S. 1000 (1978), in support of his position. These cases, however, do not employ a due process analysis. Rather they consider the requirements of federal law in federal trials.

II. Plain Error Review

[5] Walker alleges two errors in respect to instructions that were not raised to the trial court. We must first address a procedural issue. Walker did not object to the court's instructions at the trial level, but did raise the issues before the state appellate court. Normally, failure to comply with a state's contemporaneous objection rule[/2] bars habeas review unless the petitioner can show cause for the failure and actual prejudice flowing from the error. Wainwright v. Sykes, 433 U.S. 72 (1977). If, however, a state appellate court overlooks the procedural default and considers the objection on the merits, the

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[/2] Alaska requires a contemporaneous objection to trial errors, see, e.g., Owens v. State, 613 P.2d 259, 261 (Alaska 1980), but "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Alaska R. Crim. P. 47(b).

cause and prejudice requirement does not apply. Huffman v. Ricketts, 750 F.2d 798, 800-01 (9th Cir. 1984); see also County Court of Ulster County v. Allen, 442 U.S. 140, 154 91979) ("[I]f neither the state legislature nor the state courts indicate that a federal constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for the State by entertaining the claim."); Mullaney v. Wilbur, 421 U.S. 684, 688 n. 7 (1975) (reviewing habeas petition on the merits because on direct appeal Maine Supreme Judicial Court waived procedural default and addressed merits of federal constitutional claim).

The Alaska Court of Appeals in Walker, 674 P.2d at 829-30, acknowledged that Walker had failed to raise the objections before the trial court. The court said it could find plain error only "'where necessary to prevent a miscarriage of justice.'" Id. at

829 (citation omitted). We must determine whether the fact that the state appellate court reviewed the merits for plain error vitiates the cause and prejudice requirement of Wainright v. Sykes.[3] We conclude that it does.

[6] The Supreme Court has touched on this issue in dicta. In Engle v. Isaac, 456 U.S. 107 (1982), the Court found a procedural default in the defendant's failure to make a contemporaneous objection to a self-defense instruction. It noted in a footnote, however, that the State of Ohio permits the appellate courts to "overlook a procedural default if the trial defect constituted plain error." Id. at 135 n. 44. Citing Mullaney and County Court of Ulster County, the Court continued, "[i]f Ohio had

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[3] We requested additional briefing on this issue and have been assisted by the able and scholarly briefs filed by counsel for both parties.

exercised its discretion to consider respondents' claim, then their initial default would no longer block federal review." Id. Although dicta, this is a clear statement that plain error review by a state appellate court negates the defendant's procedural default.

Moreover, Ninth Circuit precedent may be read to compel this result. In Huffman v. Rickets, we reviewed the habeas claim of a petitioner who had not made a contemporaneous objection to a jury instruction in an Arizona trial. 750 F.2d at 800. The panel held that the petitioner's claim was not barred because even though the Arizona Court of Appeals observed that "[n]o objection was made below to the instruction," the state court went on to decide that "no fundamental error" had been committed. Id. at 801 & n. 2. Because there is no reason to distinguish "fundamental error" from "plain error," Huffman v. Ricketts is binding

precedent in this case. Cf. County Court of Ulster County, 442 U.S. at 151 n. 10 (describing New York's exception to the contemporaneous objection rule for errors that affect "fundamental constitutional rights").

In any event, we conclude that the purpose of the cause and prejudice determination permits us to consider a claim on federal habeas that has been reviewed by a state appellate court on the merits for plain error. Although applying a different standard of review than it would on direct appeal, a state appellate court reviewing for plan error reaches the merits of a petitioner's claim.[4] Our policy of providing an opportunity for state courts to

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[4] To the extent Phillips v. Lane, 787 F.2d 208 (7th Cir.), cert. denied, 107 S.Ct. 249 (1986), may be at odds with our analysis, we disagree. The fact that the review was optional or under a different standard does not mean that the review was not on the merits.

correct constitutional errors before a petitioner may seek relief in federal court permits us to review for error where the state court has in fact undertaken such review. No disrespect of the state court conviction may be implied from a review that a state appellate court itself has undertaken.

III. Trial Judge's Instruction on Credibility

[7] The Alaska Supreme Court clearly reviewed one of the two instructional errors on the merits even though it had not been raised in the trial court -- Walker's claim that the trial court's instruction to view an accomplice's testimony with "distrust," coupled with its instruction that Walker may be found to be an accomplice, violated his fifth and sixth amendment rights by improperly commenting on Walker's credibility. The court reviewed the instructions as to which error was claimed, the testimony that

had been adduced at trial to which the instructions related and the interrelationship of other instructions. In reaching its conclusion that there was no plain error, the court conducted a review on the merits which effectively lifted the state's procedural bar to review. We therefore reach the merits and hold ther was no error. The instruction on accomplice testimony was followed immediately by an instruction that accomplice testimony must be corroborated. Through that instruction, the court explained to the jury that the reason for treating accomplice testimony in a more circumspect manner was that an accomplice may shift the blame onto others to avoid facing liability for his own misdeeds. The main testimony against Walker at trial was provided by Willhite. We find that the instructions clearly referred to Willhite's testimony rather than that of Walker. Walker, 674 P.2d at 830.

IV. Failure to Define Recklessness

It is not so clear to us that the other claimed error was reviewed on the merits by the Alaska Supreme Court. Walker alleged that the court's failure to define recklessness, proof of which prevents a defendant from using duress as a defense, violated due process. What the Alaska court said was:

> "We have previously concluded that a trial court's failure to define the term 'recklessly' was not plain error in Williams v. State, 648 P.2d 603, 608 (Alaska App. 1982). We said: 'the meaning of "recklessly" is well within the comprehension of the average juror and the code definition appears to be a common-sense definition of the term. We do not find that the failure to define the term "recklessly" constituted plain error [Footnotes omitted.] We see no reason to depart from that holding. We find no error.'"

Id. 829, 830. Whether this analysis should be treated as a review "on the merits", see Huffman v. Ricketts, or a refusal to review, see Moreau v. State, 588 P.2d 275 (Alaska

1978)[5] because the issue had been decided in a previous case, is the question. We conclude that where the state court's review lends itself to the fair interpretation, as it does here, that it reviewed on the merits, we also may review on the merits. The Alaska court did not go so far as to hold that it was or was not error to fail to give the instruction but it did hold that it was not plain error and set forth its reasons, both that the court had so held in a previous case and that the average juror's common-sense of the meaning would suffice.

[8] On the merits we find that the failure to define criminal recklessness did not cause Walker to be "in custody in violation of the constitution, or laws, or

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[5] In Moreau v. State, 588 P.2d 275, 279-80 (Alaska 1978) the court refused to address the merits of the claim of error, because in no event could it be considered plain error.

treaties of the United States." 28 U.S.C. §2254.. "The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal." Henderson v. Kibbs, 431 U.S. 145, 154. The omission of an instruction is "less likely to be prejudicial than a misstatement of the law." Id. at 155. Further, criminal recklessness under Alaska law[/6] relates essentially to the

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/6 A.S. 11.81.900(a)(3) defines criminal recklessness in relevant part:

> [A] person acts "recklessly" with respect to a ... circumstance described by a provision of law defining an offense when the person is aware of and consciously disregards a substantial and unjustifiable risk that the ... circumstance exists; the risk must be of such a nature and degree that disregard of it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation....

common-sense definition of recklessness, which the average juror could understand and apply without an instruction. See Williams v. State, 648 P.2d 603, 608 (Alaska Ct. App. 1982).

[9] Moreover, although the omission may have been erroneous, Walker is not entitled to federal habeas relief unless "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Cupp v. Naughten, 414 U.S. 141, 147 (1973). Walker argues that the instruction infected the trial because "it relieved the government of its burden of showing criminal recklessness ... [and] aggravated the burden shift problem in the first argument." As discussed above, due process does not require the government to bear the burden of proof on duress. Recklessness is relevant to negate the duress defense. Therefore, the failure to give an

instruction defining recklessness is at most an error of state law.

V. Double Jeopardy

[10] Walker contends that the court's imposition of consecutive sentences for the two kidnappings and one robbery arising out of the same transaction violated double jeopardy. A state may punish separate offenses arising out of the same transaction without violating the double jeopardy clause. Albernaz v. United States, 450 U.S. 333 (1981). Under the test developed in Blockburger v. United States, 284 U.S. 299 (1932), robbery and kidnapping constitute separate offenses because both require proof of an element not required by the other offense.[7] Walker's claim that he cannot be punished cumulatively for the two

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[7] Robbery requires taking property without right, A.S. 11.41.510 and kidnapping requires restraining another person. A.S. 11.41.300.

kidnappings also fails. Under Alaska Law, one act of assault aimed at two victims constitutes two separate crimes and may be punished separately. Cooper v. State, 595 P.2d 648 (Alaska 1979). In Walker's appeal the Alaska court of appeals applied this rule in the context of separate victims of a single incident of kidnapping. Walker, 674 P.2d at 832-33. Because the double jeopardy clause only "protects against multiple punishments for the same offense." Missouri v. Hunter, 459 U.S. 359, 367 (1983), we find this claim to be without merit.

VI. Sentencing

Walker maintains that his total sentence of 89-years' imprisonment for his convictions for kidnapping, robbery, burglary, and theft, is excessive, and that the reason for its length is that the trial judge believed he was guilty of murder. He asserts that the total sentence violates his fifth and sixth amendment rights.

At the time of sentencing, the trial judge stated, "I agree with ... the State's position ... [that] you are guilty of murder." He then stated, "I don't propose to criticize or argue with the jury's verdict. They looked at it and they made their decision and I accept their decision." The trial judge also said that Walker "must have been aware these people were going on their last ride," and that he had a "little different perception" from Walker's that Walker did not intend for the people to be killed.

The state appellate court and the district court found that the trial judge did not rely on the facts surrounding the murder in determining Walker's sentence. We do not address this factual issue because we conclude that the trial judge could properly rely on this information.

Sentencing courts must have wide latitude in their decisions as to

punishment. Brothers v. Dowdle, 817 F.2d 1388, 1390 (9th Cir. 1987). Generally, a federal appellate court may not review a state sentence that is within the statutory limits.[8] Williams v. Duckworth, 738 F.2d 828, 831 (7th Cir. 1984), cert. denied, 469 U.S. 1229 (1985). We may vacate a sentence, however, if it was imposed in violation of due process. Brothers, 817 F.2d at 1390.

[11] The due process clause prohibits a trial judge from enhancing a sentence based on materially false or unreliable information, United States v. Messer, 785 F.2d 832, 834 (9th Cir. 1986), or based on a conviction infected by constitutional error. United States v. Tucker, 404 U.S. 443,

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[8] Walker was sentenced to 40 years for each of the two kidnapping convictions, 6 years for the robbery, 2 years for burglary, and 1 year for theft, all consecutive, for a total of 89-years' imprisonment. The crime of kidnapping carries a sentence of between 5- and 99- years' imprisonment. A.S. 12.55.125(b).

447-48 (1972). We have held, however, that a sentencing judge may rely on "facts relating to a prior acquittal" in imposing an appropriate sentence. United States v. Morgan, 595 F.2d 1134, 1135-37 (9th Cir. 1979). Although Morgan involved a prior acquittal rather than a contemporaneous acquittal, we find the case to be controlling. Sentencing judges must be able to rely on as much information about a defendant as possible in order to fashion a punishment best tailored to the particular defendant. Id. at 1137. The trial judge clearly knew that Walker was acquitted of the murder charge, and thus knew to treat the facts with caution. It was perfectly proper, however, for the judge to consider the facts that the victims were killed and that during the course of the crime Walker must have been aware that it was unlikely they were going to be permitted to live. There was more than a "minimal factual

basis," United States v. Petitto, 767 F.2d 607, 611 (9th Cir. 1985), to justify consideration of the result of the crimes in which Walker participated, even though he was acquitted of the murder charge.

AFFIRMED.